(18,803.)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1903.

No. 204.

JOHN G. FISCHER,
Plaintiff in Error,
vs.
THE CITY OF ST. LOUIS,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

STATEMENT OF FACTS.

This proceeding was instituted in the Police Court of the City of St. Louis, for the violation of Section 5 of Ordinance No. 18407 of said City, which reads as follows:

Section 5. No dairy or cow stable shall hereafter be erected, built or established within the limits of this

city without first having obtained permission so to do from the Municipal Assembly by proper ordinance, and no dairy or cow stable not in operation at the time of the approval of this ordinance shall be maintained on the premises unless permission so to do shall have been obtained from the Municipal Assembly by proper ordinance. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than one hundred nor more than five hundred dollars.

The City Attorney's complaint or statement as filed in the Police Court is as follows:

John G. Fischer to the City of St. Louis, Dr.

To five hundred dollars, for the violation of an ordinance of said city entitled, "An Ordinance in Revision of the ordinances of the City of St. Louis, and to establish new ordinance provisions for the government of said City," being ordinance No, 18,407, Section 5, approved April 6th, 1896.

In this, to-wit: In the City of St. Louis, and State of Missouri, on the 15th day of November, 1898, and on divers other days and times prior thereto, the said John G. Fischer, being the

(1) Occupant of the premises known as 7208 and 7210 North Broadway, in said city, did then and there erect, build and establish on said premises a dairy and cow stable, without first having obtained permission so to do from the Municipal Assembly by proper ordinance;

(2) And furthermore, said defendant did at said time and place maintain said dairy and cow stable, permission so to do not having been obtained from the Municipal Assembly by proper ordinance, said dairy

and cow stable not having been in operation at the time of the approval of Ordinance No. 18,407, to-wit: April 6th, 1896, contrary to ordinance in such case made and provided.

Defendant, in the Police Court, filed his motion to quash, and among other reasons given therefor, contended that Section 5 of the ordinance was in violation of the XIV Amendment to the Constitution of the United States. The motion was overruled.

Judgment being against defendant and a fine imposed, the case was appealed by defendant to the St. Louis Court of Criminal Correction, a court of record, having appellate jurisdiction in such cases, for a trial *de novo.*

The motion to quash was again argued and submitted to that court, and the Federal question again argued and presented, but the motion was overruled and exceptions were noted and saved.

As the facts were undisputed counsel submitted an agreed statement for the judgment of the Court, as follows:

AGREED STATEMENT OF FACTS.

It is hereby agreed and stipulated by and between the parties to the above entitled cause by their respective attorneys, that said cause may be submitted and tried upon the following statement of facts, to-wit:

The plaintiff, the City of St. Louis, is a municipal corporation, organized and existing under the laws of the State of Missouri, and defendant is and was on the 16th day of November, 1898, the occupant of certain premises known as 7208 and 7210 North Broadway, in the City of St. Louis, State of Missouri, upon which

premises, at said time, stood a dwelling house and a frame stable which had been erected and built prior to the occupancy of said premises by defendant.

At the time of the approval of Ordinance No. 18,407, of said city and State, said premises, buildings and stable were occupied and in use by a certain party, other than this defendant, for the purpose of operating a dairy and maintaining a cow stable, and this defendant was, at the same time, operating a dairy and maintaining a cow stable on premises known as No. 6305 Bulwer avenue, said city and State. Some time in the month of March, 1898, the said premises at Nos. 7208 and 7210 North Broadway were abandoned as a dairy and cow stable, and the dwelling house thereon was occupied by a private family for residence purposes only, and no dairy or cow stable was maintained on said premises from March, 1898, until some time in September, 1898. In September, 1898, defendant moved his cows, about thirty in number, from premises No. 6305 Bulwer avenue, said city, on to the premises Nos. 7208 and 7210 North Broadway, said city, placed them in the old stable, and did proceed to conduct upon said premises a dairy establishment and produce from said cows milk, and sell the same to his customers for profit, and was doing so on the said 16th day of November, 1898, without first having obtained permission so to do from the Municipal Assembly by proper ordinance as provided by Section 5, of Ordinance No. 18,407, of City of St. Louis, approved April 6, 1896.

It is hereby stipulated and agreed by the parties to this cause by their respective attorneys that the printed ordinance marked "Exhibit A," which is attached to and made a part of this agreed statement of facts, is a

full, true and correct copy of said Ordinance No. 18,407, and may be considered in evidence in this cause.

The Court of Criminal Correction found against defendant and imposed a fine.

The defendant filed his motions for a new trial and in arrest of judgment, again presenting the Federal question, that the section of the ordinance sued on, was in violation of the Fourteenth Amendment of the Constitution of the United States in all its parts, but both of said motions were overruled.

Defendant also, at the same time, filed his motion for judgment *non obstante veredicto*, on the undisputed facts, which was also overruled.

Defendant then appealed to the Supreme Court of Missouri, where the Federal question was again presented, and the judgment of the lower court was affirmed.

The cause is now brought to this Honorable Court on writ of error for its review.

CHARTER POWERS OF THE CITY OF ST. LOUIS,

IN FORCE AT THE TIME OF THE ALLEGED VIOLATION OF THE ORDINANCE.

"The Mayor and Assembly shall have power within the city, by ordinance not inconsistent with the Constitution or any law of this State, or of this Charter, * * * to * * * prohibit the erection of * * * cow stables and dairies, * * * within prescribed limits, and to remove and regulate the same."

Vol. 2, Rev. Stat. of Mo. A. D. 1899, at page 2486, Art. 3, Sec. 26, Par. sixth.

"Finally, to pass all such ordinances, not inconsistent with the provisions of this Charter, or the laws of the State, as may be expedient, in maintaining the peace, good government, health and welfare of the city, its trade, commerce and manufactures, and to enforce the same by fines and penalties not exceeding five hundred dollars, and by forfeitures not exceeding one thousand dollars;" * * *

Vol. 2, Rev. Stat. of Mo., A. D. 1899, at page 2488, Art. 3, Sec. 26, Par. fourteenth.

"No ordinance passed by the Assembly, * * * shall take effect or be in force until ten days after its approval." * * *

Vol. 2, Rev. Stat. of Mo., A. D. 1899, at page 2483, Art. 3, Sec. 21.

BRIEF.

I.

Section 5 of the ordinance (the only one in issue) is in violation of the XIVth Amendment to the Constitution of the United States, in this:

(*a*) Nor shall any State deprive any person of life, liberty or property without due process of law.

(*b*) Nor deny to any person the equal protection of the laws.

Yick Wo v. Hopkins, 118 U. S. 356.

II.

The Supreme Court of the United States will make its own interpretation of the ordinance where its validity is assailed as in violation of the United States Constitution.

Yick Wo v. Hopkins, *supra*.

It will determine finally whether legislation or action under State authority is due process of law.

State v. Sponagle, 45 W. Va. 415;
" " 43 L. R. A. 727.

III.

The City Attorney's statement (if so properly termed) under which the cause was tried, is in two counts:

(1) That the defendant did erect, build and establish a dairy and cow stable, and

(2) That he did maintain said dairy and cow stable, which had not been in operation at the time of the approval of the ordinance No. 18,407, to-wit, April 6th, 1896.

All without the permission of the Municipal Assembly by proper ordinance.

(*a*) This is a denial of the equal protection of the laws.

Yick Wo v. Hopkins, *supra.*

(*b*) The complaint and the ordinance are not in consonance with the charter provision which prohibits the "erection" of dairies and cow stables within "prescribed limits." If the "erection" has been in positive violation of law, then the charter gives power to "remove and regulate same," to-wit: The "erection" or building which was unlawfully erected.

Eichenlaub v. St. Joseph, 113 Mo. 395.

(*c*) For "the prescribed limits" it substitutes the "permission" of the Municipal Assembly, which cannot be done.

State v. Mahner, 43 La. Ann. 496, 500.

(*d*) The discretion of the Municipal Assembly being exercised against the dairyman's right to use the property—deprives him of his property without due process of law, and by granting a right so to do to the one party and refusing it to another, without the intervention of rules of law,—denies to the one not in favor, the equal protection of the laws.

Yick Wo v. Hopkins, *supra.*

(*e*) The use of one's property is as much property as the property itself.

City of St. Louis v. Hill, 116 Mo. 527, 533–4;
City of St. Louis v. Dorr, *et al.*, 145 Mo. 466, 485, 501.

IV.

(*a*) The dairy and cow stable had been lawfully erected prior to, and was in lawful operation at, the time of the passage of Section 5 of the ordinance in controversy. (See stipulated facts.) It was therefore "property" in the broadest sense of the term.

St. Louis v. Hill, *supra.*
St. Louis v. Dorr, *et al.*, *supra.*

(*b*) The right of use and occupation was a vested right, which could not be arbitrarily or capriciously destroyed at the uncontrolled will of the local authorities.

Yates v. Milwaukee, 77 U. S. 497, 504–5.

(*c*) The question of nuisance does not enter into this case.

Yates v. Milwaukee, *supra;*
River Rendering Co. v. Behr, 77 Mo. 91.

(*d*) A dairy or cow stable is not a nuisance *per se.*
St. Louis v. Schnuckelberg, 7 Mo. App. 536, 540–1.

V.

(*a*) The St. Louis Charter power is to "prohibit" the erection of cow stables and dairies "within prescribed limits." If the prohibition applies to the entire city why use the words "prescribed limits?" These

words imply a limitation within the bounds of the city, and mean definite, named, designated boundaries or localities as, for instance, found

In re Linahan, 72 Calif. 114.

The word "limit" most obviously and normally designates a bound, "a restraint, a circumspection, a boundary."

Casler v. Ins. Co. 22 N. Y., *loc. cit.* 429.

"Prescribe" means to "ordain," "appoint," "define authoritatively."

See dictionaries generally.

(*b*) The same charter gives power to "regulate, restrain or prohibit the erection of wooden buildings within the prescribed limits." See:

2 Rev. St. of Mo., A. D. 1899, at p. 2488; being Art. 3, Sec. 26, par. twelfth of Charter.

Could the farmer, in the farming districts of the city, be compelled to obtain the permission of the Municipal Assembly to erect a wooden building on his farm, far removed from other human habitations? Must the fact of the erection be left to the whim, caprice or favoritism of this legislative body, or should it be made to conform to general regulations applying to all persons of the same class?

(*c*) If the power be to "regulate," then the regulation must be uniform and apply to all of the same class. Does the XIVth Amendment permit neighbor **A** to be regulated and neighbor **B** to be prohibited, just because **A** may have more influence, political, religious,

social or otherwise with that body? Is there any test of fitness prescribed?

(*d*) In the liquor or dramshop license cases and other cases, the test may be committed to some officer or officers to judge of the personal fitness or character of the applicant. In this case the test is to the establishment itself. In other words **B** may want to use his farm for dairy purposes and build thereon a cow stable in conformity with all the building regulations. He is refused permission without valid reasons of any kind. **A**, with such permission, may erect and operate his cow stable in the choicest residence district of the city.

If this is not violative of the XIVth Amendment, what is it? Yet under the ordinance this can be done.

Yick Wo v. Hopkins, *supra*;
Boyd v. Board of Councilmen, 77 S. W. (Ky.) 669.

(*e*) If Sec. 5 of the ordinance is under the charter power to "prohibit" it must apply to all persons alike and without discrimination. The same rule applies to the power to "regulate." You cannot by special ordinance "prohibit" "**B**" and at the same time "regulate" "**A**."

Tugman v. Chicago, 78 Ill. 405, 409;
Hibbard v. Chicago, 173 Ill. 91, 98;
St. Louis v. Russell, 116 Mo. 248, 257–8;
State v. Walsh, 136 Mo. 400, 406;
Shreveport v. Robinson, 51 La. Ann. 1314;
Town of Crowley v. West, 52 La. Ann. 526, 534;
Cooley Const. Lim. (6th Ed.) p. 137, Note 1;
" " pp. 481–483.

(*f*) There is a substantial difference between "prohibition" and "regulation."

Chillicothe v. Brown, 38 Mo. App., p. 617;
State v. Burgdoerfer, 107 Mo. 1, 24–26;
State v. Mott, 61 Md. 297, 308–9;
Merced County v. Fleming, 111 Calif. 46, 50;
Los Angeles v. Hollywood Cemetery Association, 124 Calif. 344, 349.

(*g*) Whatever charter power be relied upon, whether it be to "prohibit" or to "regulate," it must be by general laws, or ordinances, applying to all alike, of the same class. The exercise of the power, in any given particular or individual case, cannot be delegated to any individual, officer, board, committee, or even to the municipal legislative body itself.

Yick Wo. v. Hopkins, *supra;*
St. Louis v. Russell, 116 Mo. *loc. cit.*, 256, 258;
Barthet v. New Orleans, 24 Fed. 564;
In re Quong Woo, 13 Fed. 229;
State v. Mahner, 43 La. Ann. 496;
Newton v. Belger, 143 Mass. 598;
Richmond v. Dudley, 129 Ind. 112;
State v. Dubarry, 44 La. Ann. 1117;
State v. Tenant, 110 N. C. 609;
Tugman v. Chicago, 78 Ill. 409;
Baltimore v. Radecke, 49 Md. 217;
Boyd v. Board of Councilmen, *supra;*
Cooley Const. Lim. (6th Ed.) p. 137.

VI.

(*a*) Section 5 of the ordinance does not condemn all dairies or cow stables, but only such as are "erected"

without the permission of the Municipal Assembly. This body possesses only the delegated powers. The legislature, which is the representative of, what might be termed, the sovereign power, cannot, constitutionally, declare a given use of a particular property as harmful or as a nuisance. This would be exercising a judicial function.

Quintini v. Bay St. Louis, 64 Miss. 483;
Tiedeman on Police Powers, Sec. 122a, p. 426;
Wood on Nuis. 3rd Ed. Sec. 744, p. 976;
Mayor, Etc. v. Thorne, 7 Paige (N. Y.) 261;
Hutton v. City of Camden, 39 N. J. L. 122, 130;
New Orleans v. Blineau, 3 La. Ann. 689;
State v. Mott, 61 Md. 297, 308;
Evansville v. Miller, 146 Ind. 613, 620;
Eden v. The People, 161 Ill. 296, 308;
In re Jacobs, 98 N. Y. 98, 111.

(*b*) The judicial powers cannot be delegated as attempted in Section 5 of the ordinance.

Cooley Const. Lim. (6th Ed.) p. 504;
" " " " p. 137.

(*c*) No such power of confiscation, without any judicial ascertainment of the fact of harmfulness, is given by the charter.

St. Louis v. Schnuckelberg, *supra.*

VII.

(*a*) The ordinance is not only leveled at dairies or cow stables from which milk is sold or delivered to the public, but applies as well to the householder who may want to keep one or two cows for milk, butter and cheese for his own family. Ordinances restricting pri-

vate rights in so sweeping a degree have been declared unreasonable and oppressive.

The Stockton Laundry Case, 26 Fed. 611, 612;
St. Louis v. Heitzberg, 141 Mo. 375, 388.

(*b*) The theory of our Government, State and national, is opposed to the deposit of unlimited power anywhere. The executive, legislative and the judicial branches of these governments are all of limited and defined power.

Curry v. District of Columbia, 14 App. D. C. 423, 439, 440;
Loan Association v. Topeka, 20 Wall. 622;
Minnesota v. Barber, 136 U. S. 313, 320;
R. R. Co. v. Chicago, 166 U. S. 226, 237;
State v. Loomis, 115 Mo. 307, 313;
R. R. Co. v. State, 47 Neb. 549, 573.

VIII.

The personal liberty of the citizen and his right of property cannot thus be invaded under the guise of a police regulation.

Ex parte Sing Lee, 96 Calif. 354, 358;
In re Jacobs, 98 N. Y. 98, 109;
Dill. Munc. Corp., 4th Ed., Sec. 374, pp. 447–9;
River Rendering Co. v. Behr, 77 Mo. 91, 98–99;
State v. Julow, 129 Mo. 163, 177;
State v. Walsh, 136 Mo. 400, 407;
Eden v. The People, 161 Ill. 296, 308;
Minnesota v. Barber, 136 U. S. 313, 320;
Yick Wo v. Hopkins, *supra;*
Allgeyer v. Louisiana, 165 U. S. 578, 589;
U. S. v. Sweeney, 95 Fed. 434, 450–1.

IX.

(*a*) Section 5 of the ordinance being highly penal in its nature and consequences, must be subject to strict construction. This is the rule in Missouri.

St. Louis v. Dorr, 136 Mo. 370, 375;
St. Louis v. Robinson. 135 Mo. 460, 470.

Its provisions cannot be carried beyond its express terms.

Town of Pacific v. Seifert, 79 Mo. 210, 215.

(*b*) "Nothing can be taken by intendment in such a prosecution."

St. Louis v. Robinson, *supra*;
State v. Schuchmann, 133 Mo. 111, 117.

(*c*) "When doubts arise concerning their interpretation, such doubts are to weigh only in favor of the accused."

State v. Schuchmann, *supra*;
Canton v. Dawson, 71 Mo. App. 235, 239;
State v. Bryant, 90 Mo. 534, 537–8.

(*d*) "Equitable constructions are never given to mere arbitrary regulations of public policy."

Westport v. Mastin, 62 Mo. App. at p. 658.

X.

(*a*) No case has been made against the defendant under the *allegata* and *probata*. Where the facts are undisputed, where a man is punished for a matter not complained of, he is deprived of his due process of law. The first count charges that defendant did "erect, build and establish." The proof shows that he did not

"erect" or "build." He did not "establish" which means "to found originally"—"the act of originating."

Ketchum v. Buffalo, 14 N. Y. *loc. cit.* 361;
See also Webster's Dictionary.

(*b*) The second count cannot be upheld. The Charter forbids the "erection" after the passage of the ordinance. It was in existence before. Its erection was one thing, its use after that an entirely different one.

St. Louis v. Dorr, 136 Mo. *loc. cit.* 375.

(*c*) The Municipal Assembly cannot limit the use of this buiding and force the owner to convert it to other uses to which it was unfit and, to that extent, deprive the owner of his property, and the use of it, without due process of law.

The Stockton Laundry Case, 26 Fed. 611, 615;
Hutton v. Camden, 39 N. J. *loc. cit.* 130.

Respectfully submitted.

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